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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 ROBERT DANIEL PERRY, ) Civil No. 09cv622 LAB (RBB)  
11 )  
12 Plaintiff, ) **REPORT AND RECOMMENDATION**  
13 v. ) **GRANTING DEFENDANTS' MOTION TO**  
14 ) **DISMISS AND ORDER DENYING**  
15 ) **MOTION TO STRIKE [DOC. NO. 35]**  
16 GLORIA GARCIA, D. BROWN, E. )  
17 DUARTA, M. WIERZBICKY, J. )  
18 VALDEZ, R. JACKSON, G. )  
19 PEDERSON, E. CONTRERAS, C. )  
20 FERNANDEZ, )  
21 )  
22 Defendants. )  
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24 )  
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18 Plaintiff Robert Daniel Perry, a state prisoner proceeding pro  
19 se and in forma pauperis, filed a Complaint on March 25, 2009,  
20 pursuant to 42 U.S.C. § 1983 [doc. no. 1].<sup>1</sup> A summons was returned  
21 unexecuted for Defendants Gloria Garcia, C. Fernandez, R. Jackson,  
22 J. Valdez, and E. Contreras [doc. nos. 14, 16-19]. Defendants M.  
23 Wierzbicky, D. Brown, E. Duarte, and G. Pederson waived service of  
24 the summons [doc. nos. 25-28]. Plaintiff has filed several Motions  
25 for Default Judgment against Defendants, which were all denied or  
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28 <sup>1</sup> Because Perry's Complaint is not consecutively paginated,  
the Court will use the page numbers assigned by the electronic case  
filing system.

1 rejected by United States District Judge Larry Allen Burns [doc.  
2 nos. 13, 15, 20, 23, 29, 31-34, 37-40, 46, 49].

3 On February 16, 2010, the four appearing Defendants filed a  
4 Motion to Dismiss with a Memorandum of Points and Authorities in  
5 Support of the Motion, an attached exhibit, and Declarations from  
6 J. Walker, D. Foston, and G. Pederson and exhibits [doc. no. 35].  
7 The next day, the Court issued a Klinge/Le/Rand Notice advising  
8 Perry of Defendants' pending Motion to Dismiss for failure to  
9 exhaust his administrative remedies and allowing him time to  
10 present any evidence demonstrating exhaustion [doc. no. 36].  
11 Plaintiff's Opposition to Defendants' Motion to Dismiss, titled  
12 "Plaintiff Exhausted all of his Administrative Remedies," was filed  
13 on March 10, 2010 [doc. no. 41].

14 On March 22, 2010, Defendant E. Contreras filed a Joinder to  
15 Motion to Dismiss [doc. no. 42]. The Court issued a second  
16 Klinge/Le/Rand Notice and gave Perry additional time to oppose the  
17 Motion and submit evidence [doc. no. 44]. Plaintiff's second  
18 Opposition, also titled "Plaintiff Exhausted All of his  
19 Administrative Remedies," was filed on March 26, 2010 [doc. no.  
20 45].

21 The Court finds Defendants' Motion suitable for decision  
22 without oral argument pursuant to Civil Local Rule 7.1(d)(1). The  
23 Court has reviewed the Complaint, Defendants' Motion to Dismiss and  
24 attachments, Defendant Contreras's Joinder, and Plaintiff's  
25 Oppositions. For the reasons set forth below, the district court  
26 should **GRANT** Defendants' Motion to Dismiss.

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1 I. FACTUAL BACKGROUND

2 Plaintiff is currently a prisoner at the Folsom State Prison  
3 ("Folsom"); however, the allegations in his Complaint arise from  
4 events that occurred while he was incarcerated at Richard J.  
5 Donovan Correctional Facility ("Donovan") between April 2 and June  
6 10, 2008. (Compl. 1.)

7 In count one, Perry argues that on April 2, 2008, he completed  
8 an emergency dental request form. (Id. at 4.) He explains that he  
9 "ran into the dentist office demanding treatment" due to serious  
10 dental pain. (Id.) The dentist refused to treat him so he "made  
11 so much noise that Correctional Sergeant [Brown], Correctional  
12 Officer [Duarta] and Correctional Officer [Jackson] rushed [him] to  
13 the ground and put [him] in handcuffs." (Id.) Then Duarte and  
14 Jackson beat and kicked him while Brown yelled racial obscenities.  
15 (Id.) Perry contends that he threatened to sue Defendants for  
16 "\$100 million for assault and battery, a violent hate crime and  
17 medical negligence." (Id.) He claims to have been taken to the  
18 administrative segregation unit where he was beaten and kicked  
19 again. (Id.) After two days in the "AD/SEG hospital," Perry was  
20 "blindfolded and put in a wheel chair and taken back to [his]  
21 cell." (Id.) He was told to drop his lawsuit and not to talk  
22 about the incident or the Defendants would kill him. (Id.)

23 In count two, Plaintiff alleges that on April 17, 2008, an  
24 announcement was made over the loud-speaker for him to report to  
25 the main office. (Id. at 5.) Upon his arrival, Defendant Brown  
26 placed him in handcuffs and leg restraints; then Brown, Wierzbicky,  
27 and Jackson brought him into a room where Defendants Valdez,  
28 Contreras, and Garcia were waiting. (Id.) Warden Garcia told

1 Perry to drop his lawsuit or "[he's] a dead man." (Id.) Perry  
2 responded with profanity, and Garcia slapped him. (Id.) Plaintiff  
3 explained that he needed to see a dentist due to severe pain and  
4 mouth disease, and he was going to sue "for \$100 million for  
5 conspiracy to cover up [his] lawsuit, medical malpractice, medical  
6 negligence, cruel and unusual punishment and [he explained that he]  
7 had already started [his] lawsuit." (Id.) Then, Defendants Brown,  
8 Jackson, and Wierzbicky beat and kicked him. (Id.) Plaintiff  
9 alleges that the beating continued for fifteen minutes until Brown  
10 took him back to the main office, wrote a rules violation report  
11 against him, removed the restraints, and sent Perry back to his  
12 cell. (Id.)

13 In count three, Perry asserts that on June 10, 2008, his gums  
14 were infected and bleeding, so he went to the dentist's office and  
15 demanded treatment. (Id. at 6.) The dentist and his staff refused  
16 to treat him, and Defendants Wierzbicky, Jackson, Duarte, and Brown  
17 placed him in handcuffs and leg restraints. (Id.) Lieutenant  
18 Pederson ordered Defendants to take Plaintiff to his cell block  
19 where they placed him in "a cage." (Id.) Defendants gathered his  
20 legal and personal property. (Id.) They put Perry in the  
21 administrative segregation unit where Defendants beat and kicked  
22 him while Brown yelled racial obscenities at Perry. (Id.)  
23 Plaintiff contends that Brown hit him on the head and neck with a  
24 four-foot stick for about fifteen minutes until the stick broke.  
25 (Id.) Defendants continued to beat and kick him for another thirty  
26 minutes to an hour. (Id. at 6-7.) Each Defendant kicked and spat  
27 on him; then Defendants Pederson, Wierzbicky, Jackson, Duarte, and  
28 Brown yelled racial profanities at Perry while warning him not to

sue the prison. (Id. at 7.) Lieutenant Pederson told the other Defendants, "Now let's go destroy his property." (Id.) Plaintiff never saw his property again. (Id.) He was placed in the administrative segregation unit's hospital for two weeks until he was released by the doctor on June 24, 2008. (Id.) Upon his release, Perry tried to commit suicide. (Id.) He was taken back to the hospital and was provided sleeping medication. (Id.) When he awoke, he had been transferred to Folsom. (Id.)

## II. LEGAL STANDARDS APPLICABLE TO DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

### A. Rule 12(b)(6) Motions to Dismiss

A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims in the complaint. See Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999). "The old formula -- that the complaint must not be dismissed unless it is beyond doubt without merit -- was discarded by the Bell Atlantic decision [Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563 n.8 (2007)]." Limestone Dev. Corp. v. Vill. of Lemont, 520 F.3d 797, 803 (7th Cir. 2008).

A complaint must be dismissed if it does not contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp., 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, \_\_ U.S. \_\_, 129 S.Ct. 1937, 1949 (2009). The court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them, and must construe the complaint in the light

1 most favorable to the plaintiff. Cholla Ready Mix, Inc. v. Civish,  
2 382 F.3d 969, 973 (9th Cir. 2004) (citing Karam v. City of Burbank,  
3 352 F.3d 1188, 1192 (9th Cir. 2003)); Parks Sch. of Bus., Inc. v.  
4 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995); N.L. Indus., Inc. v.  
5 Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

6 The test is not whether the plaintiff will "ultimately  
7 prevail but whether the claimant is entitled to offer evidence to  
8 support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974);  
9 see Bell Atl. Corp. v. Twombly, 550 U.S. at 563 n.8. A dismissal  
10 under Rule 12(b)(6) is generally proper only where there "is no  
11 cognizable legal theory or an absence of sufficient facts alleged  
12 to support a cognizable legal theory." Navarro v. Block, 250 F.3d  
13 729, 732 (9th Cir. 2001) (citing Balistreri v. Pacifica Police  
14 Dep't, 901 F.2d 696, 699 (9th Cir. 1988)).

15 The court need not accept conclusory allegations in the  
16 complaint as true; rather, it must "examine whether [they] follow  
17 from the description of facts as alleged by the plaintiff." Holden  
18 v. Haqopian, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation  
19 omitted); see Halkin v. VeriFone, Inc., 11 F.3d 865, 868 (9th Cir.  
20 1993); see also Cholla Ready Mix, 382 F.3d at 973 (quoting Clegg v.  
21 Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994))  
22 (stating that on Rule 12(b)(6) motion, a court "'is not required to  
23 accept legal conclusions cast in the form of factual allegations if  
24 those conclusions cannot reasonably be drawn from the facts  
25 alleged[']"). "Nor is the court required to accept as true  
26 allegations that are merely conclusory, unwarranted deductions of  
27 fact, or unreasonable inferences." Sprewell v. Golden State  
28 Warriors, 266 F.3d 979, 988 (9th Cir. 2001).

1        When resolving a motion to dismiss for failure to state a  
 2 claim, courts may not generally consider materials outside the  
 3 pleadings. Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1197  
 4 n.1 (9th Cir. 1998); Jacobellis v. State Farm Fire & Cas. Co., 120  
 5 F.3d 171, 172 (9th Cir. 1997); Allarcom Pay Television Ltd. v. Gen.  
 6 Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). "The focus of  
 7 any Rule 12(b)(6) dismissal . . . is the complaint." Schneider,  
 8 151 F.3d at 1197 n.1. This precludes consideration of "new"  
 9 allegations that may be raised in a plaintiff's opposition to a  
 10 motion to dismiss brought pursuant to Rule 12(b)(6). Id. (citing  
 11 Harrell v. United States, 13 F.3d 232, 236 (7th Cir. 1993)).

12        "When a plaintiff has attached various exhibits to the  
 13 complaint, those exhibits may be considered in determining whether  
 14 dismissal [is] proper . . . ." Parks Sch. of Bus., 51 F.3d at 1484  
 15 (citing Cooper v. Bell, 628 F.2d 1208, 1210 n.2 (9th Cir. 1980)).  
 16 The court may also consider "documents whose contents are alleged  
 17 in a complaint and whose authenticity no party questions, but which  
 18 are not physically attached to the pleading . . . ." Branch v.  
 19 Tunnell, 14 F.3d 449, 454 (9th Cir. 1994), overruled on other  
 20 grounds by Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th  
 21 Cir. 2002); Stone v. Writer's Guild of Am. W., Inc., 101 F.3d 1312,  
 22 1313-14 (9th Cir. 1996).

23        These Rule 12 (b)(6) guidelines apply to Defendants' Motion to  
 24 Dismiss.

#### 25    **B. Standards Applicable to Pro Se Litigants**

26        Where a plaintiff appears in propria persona in a civil rights  
 27 case, the court must construe the pleadings liberally and afford  
 28 the plaintiff any benefit of the doubt. Karim-Panahi v. Los

1 Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). The rule  
2 of liberal construction is "particularly important in civil rights  
3 cases." Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992).  
4 In giving liberal interpretation to a pro se civil rights  
5 complaint, courts may not "supply essential elements of claims that  
6 were not initially pled." Ivey v. Bd. of Regents of the Univ. of  
7 Alaska, 673 F.2d 266, 268 (9th Cir. 1982). "Vague and conclusory  
8 allegations of official participation in civil rights violations  
9 are not sufficient to withstand a motion to dismiss." Id.; see  
10 also Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649 (9th Cir.  
11 1984) (finding conclusory allegations unsupported by facts  
12 insufficient to state a claim under § 1983). "The plaintiff must  
13 allege with at least some degree of particularity overt acts which  
14 defendants engaged in that support the plaintiff's claim." Jones,  
15 733 F.2d at 649 (internal quotation omitted).

16 Nevertheless, the court must give a pro se litigant leave to  
17 amend his complaint "'unless it determines that the pleading could  
18 not possibly be cured by the allegation of other facts.'" Lopez v.  
19 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (quoting Doe  
20 v. United States, 58 F.3d 494, 497 (9th Cir. 1995)). Thus, before  
21 a pro se civil rights complaint may be dismissed, the court must  
22 provide the plaintiff with a statement of the complaint's  
23 deficiencies. Karim-Panahi, 839 F.2d at 623-24. But where  
24 amendment of a pro se litigant's complaint would be futile, denial  
25 of leave to amend is appropriate. See James v. Giles, 221 F.3d  
26 1074, 1077 (9th Cir. 2000).



**C. Stating a Claim Under 42 U.S.C. § 1983**

To state a claim under § 1983, the plaintiff must allege facts sufficient to show (1) a person acting "under color of state law" committed the conduct at issue, and (2) the conduct deprived the plaintiff of some right, privilege, or immunity protected by the Constitution or laws of the United States. 42 U.S.C.A. § 1983 (West 2003); Shah v. County of Los Angeles, 797 F.2d 743, 746 (9th Cir. 1986).

**III. DEFENDANTS' MOTION TO DISMISS**

Defendants Brown, Duarte, Wierzbicky, Pederson, and Contreras move to dismiss Perry's Complaint. (Mot. Dismiss 1; Def. Contreras Joinder 1.) Defendants assert Plaintiff failed to exhaust the administrative remedies for his claims. (Mot. Dismiss Attach. #1 Mem. P. & A. 5-8.) In addition, they argue that Plaintiff's allegations regarding attempted murder and a violent hate crime should be stricken because Plaintiff cannot initiate criminal charges against them. (Id. at 8.) Defendants contend they are immune from a suit for damages against them in their official capacities. (Id. at 8-9.) They maintain that Perry's state law claim is barred because he failed to file a tort claim with the Victim's Compensation Government Claim Board. (Id. at 9-11.) Finally, Defendants argue that Plaintiff is not entitled to injunctive relief. (Id. at 11-12.)

**A. Exhaustion**

**1. Motion to Dismiss Unexhausted Claims Pursuant to the Unenumerated Portions of Rule 12(b)**

Title 42 U.S.C. § 1997e(a) of the Prison Litigation Reform Act ("PLRA") states: "No action shall be brought with respect to

1 prison conditions under section 1983 of this title, or any other  
2 Federal law, by a prisoner confined in any jail, prison, or other  
3 correctional facility until such administrative remedies as are  
4 available are exhausted." 42 U.S.C.A. § 1997e(a) (West 2003). The  
5 exhaustion requirement applies regardless of the relief sought.  
6 Booth v. Churner, 532 U.S. 731, 741 (2001) (citation omitted).

7 "[A]n action is "brought" for purposes of § 1997e(a) when the  
8 complaint is tendered to the district clerk[]" . . . ." Vaden v.  
9 Summerhill, 449 F.3d 1047, 1050 (9th Cir. 2006) (quoting Ford v.  
10 Johnson, 362 F.3d 395, 400 (7th Cir. 2004)). Therefore, prisoners  
11 must "exhaust administrative remedies before submitting any papers  
12 to the federal courts." Id. at 1048 (emphasis added).

13 Section 1997e(a)'s exhaustion requirement creates an  
14 affirmative defense. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th  
15 Cir. 2003). "[D]efendants have the burden of raising and proving  
16 the absence of exhaustion." Id. (footnote omitted). Defendants in  
17 § 1983 actions properly raise the affirmative defense of failure to  
18 exhaust administrative remedies through an unenumerated motion to  
19 dismiss under Rule 12(b). Id. (citations omitted).

20 Unlike motions to dismiss for failure to state a claim for  
21 which relief may be granted, "[i]n deciding a motion to dismiss for  
22 failure to exhaust nonjudicial remedies, the court may look beyond  
23 the pleadings and decide disputed issues of fact." Id. at 1119-20  
24 (citing Ritza v. Int'l Longshoremen's & Warehousemen's Union, 837  
25 F.2d 365, 369 (9th Cir. 1988)) (footnote omitted). Courts have  
26 discretion regarding the method they use to resolve such factual  
27 disputes. Ritza, 837 F.2d at 369 (citations omitted). "A court  
28 ruling on a motion to dismiss also may take judicial notice of

1 'matters of public record.'" Hazleton v. Alameida, 358 F. Supp. 2d  
 2 926, 928 (C.D. Cal. 2005) (citing Lee v. City of Los Angeles, 250  
 3 F.3d at 688 (citations omitted)). But "if the district court looks  
 4 beyond the pleadings to a factual record in deciding the motion to  
 5 dismiss for failure to exhaust[,]. . . the court must assure that  
 6 [the plaintiff] has fair notice of his opportunity to develop a  
 7 record." Wyatt, 315 F.3d at 1120 n.14.

8 "[When] the district court concludes that the prisoner has not  
 9 exhausted nonjudicial remedies, the proper remedy is dismissal of  
 10 the claim without prejudice." Id. at 1120 (citing Ritza, 837 F.2d  
 11 at 368 n.3).

## 12 **2. The Administrative Grievance Process**

13 "The California Department of Corrections ["CDC"] provides a  
 14 four-step grievance process for prisoners who seek review of an  
 15 administrative decision or perceived mistreatment: an informal  
 16 level, a first formal level, a second formal level, and the  
 17 Director's level." Vaden, 449 F.3d at 1048-49 (citing Brown v.  
 18 Valoff, 422 F.3d 926, 929-30 (9th Cir. 2005)). The administrative  
 19 appeal system can be found in title 15, sections 3084.1, 3084.5,  
 20 and 3084.6 of the California Code of Regulations. See Brown, 422  
 21 F.3d at 929-30 (citing Cal. Code Regs. tit. 15, §§ 3084.1(a),  
 22 3084.5(a)-(b), (e)(1)-(2), 3084.6(c)).

23 To comply with the CDC's administrative grievance procedure,  
 24 an inmate must file his grievance at the informal level "within 15  
 25 working days of the event or decision being appealed . . . ." Cal.  
 26 Code Regs. tit. 15, § 3084.6(c) (2009); see also Brown, 422 F.3d at  
 27 929. An inmate must proceed through all levels of the  
 28

1 administrative grievance process before initiating a § 1983 suit in  
2 federal court. See Vaden, 449 F.3d at 1051.

3 A prisoner's grievances must be "sufficient under the  
4 circumstances to put the prison on notice of the potential claims  
5 and to fulfill the basic purposes of the exhaustion requirement."  
6 Irvin v. Zamora, 161 F. Supp. 2d 1125, 1135 (S.D. Cal. 2001).  
7 Exhaustion serves several important goals, including "allowing a  
8 prison to address complaints about the program it administers  
9 before being subjected to suit, reducing litigation to the extent  
10 complaints are satisfactorily resolved, and improving litigation  
11 that does occur by leading to the preparation of a useful record."  
12 Jones v. Bock, 549 U.S. 199, 219 (2007) (citing Woodford v. Ngo,  
13 548 U.S. 81, 88-91 (2006); Porter v. Nussle, 534 U.S. 516, 524  
14 (2002)).

### 15 3. Plaintiff's Failure To Exhaust

16 Defendants argue that Perry attempted to exhaust his  
17 administrative remedies for his dental care claims, but he never  
18 alleged that there had been "beatings, property confiscation,  
19 institution wide conspiracies, attempted murder, and all other  
20 allegations advanced in the complaint." (Mot. Dismiss Attach. #1  
21 Mem. P. & A. 7.) Defendants explain that Perry filed two  
22 grievances regarding dental care at the Director's level, but both  
23 were screened out. (Id.) One grievance had added a new demand for  
24 payment of \$5,000,000, and the other was submitted directly to the  
25 third level of review in an attempt to bypass prison procedures.  
26 (Id.) Thus, Perry failed to properly exhausted his administrative  
27 remedies. (Id. at 8); Fed. R. Civ. P. 12(b).

28

Perry alleges in his Complaint that he "did everything on a timely basis[.] [His] appeal form 602 was denied at all 3 levels. [He] sought medical dental help. [He] was refused treatment time after time . . . ." (Compl. 8.) In his first Opposition, Plaintiff declares his statements are true and correct and explains that "[he] exhausted all of [his] administrative remedies . . . ." (Opp'n 1, Mar. 10, 2010.) In his second Opposition, Perry again declares that his statements are true and correct and argues, "[he] exhausted all of his administrative remedies on or about June 10, 2008 when [he] was [prevented] from seeking dental treatment . . . ." (Opp'n 1, Mar. 26, 2010.) Plaintiff reiterates the allegations in his Complaint and asserts that "among the property that was stolen on or about June 10, 2008 was 3 completed appeals forms for [his] dental care, hospital care, [and] assaults . . . ." (Id. at 2.)

#### **a. Dental Care Claims**

In ruling on Defendants' Motion, the Court may "look beyond the pleadings and decide disputed issues of fact." Wyatt, 315 F.3d at 1119-20 (citing Ritza, 837 F.2d at 369). Although Plaintiff did not provide a copy of any 602 with either of his Oppositions, Defendants submitted copies of Perry's grievance and appeals as exhibits to the Declarations of J. Walker, chief of the third level appeal -- health care, and G. Pederson, appeals coordinator at Richard J. Donovan Correctional Facility.<sup>2</sup> (Mot. Dismiss Attach. #2 Decl. Walker Exs. A-D; id. Attach. #4 Decl. Pederson Exs. A-B.)

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<sup>2</sup> Perry claims that prison officials stole his completed grievance forms, but in his Oppositions, he does not explain whether the grievance and appeals Defendants submit along with the Motion to Dismiss are copies of the forms he claims he no longer possesses. (Opp'n 2, Mar. 26, 2010.)

1 In his informal grievance dated February 21, 2008, Perry  
2 alleged that he had filed an emergency dental request form two  
3 months earlier and was told he would be re-ducated, but "it [was]  
4 two months later and [he has] not been called."<sup>3</sup> (Mot. Dismiss  
5 Attach. #2 Decl. Walker Ex. A at 1.) Plaintiff explained it "[was]  
6 an urgent emergency [because he had] 'pyorrhea of the gums' due to  
7 excessive plaque build up over the last ten years." (Id.) Perry  
8 listed his symptoms as inflamed gums, bleeding during brushing, and  
9 foul smelling breath; he described the negative effect his dental  
10 problems had on his relationship with cellmates. (Id.) Perry  
11 concluded by asserting that "[Donovan was] not providing [him]  
12 constitutionally adequate dental treatment." (Id.) He requested  
13 "an Emergency Dental Appointment" and that his teeth be cleaned and  
14 that he be provided Penicillin. (Id.)

15 On March 3, 2008, Plaintiff's grievance form was returned to  
16 him after being partially granted; it stated, "You were seen and  
17 examined on [February 22, 2008] by the facility dentist; oral  
18 hygiene instructions [were] given to you. You are considered a  
19 Dental Priority 3, treatment within one year. You will be ducated  
20 in chronological order for treatment." (Id.)

21 Perry appealed this decision on March 6, 2008, asserting, "I  
22 am totally dissatisfied: last week I was called into the dental  
23 office and I was told that I would be re-ducated for a dentist  
24 appointment. [My] dental condition is an emergency [and] I need my  
25 teeth cleaned immediately." (Id.) He complained that the proposed  
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27 <sup>3</sup> Appeals Coordinator of Richard J. Donovan Correctional  
28 Facility, G. Pederson, also submitted a copy of this grievance  
along with his Declaration. (Id. Attach. #4 Decl. Pederson Ex. B.)

1 year delay in treatment was "a convenient method for [Donovan]  
2 dental to evade providing [him] emergency treatment." (Id.)  
3 Plaintiff also asserted that he had "hoof and mouth disease."  
4 (Id.)

5 At the first formal level, his appeal was reviewed, partially  
6 granted, and returned to him on May 13, 2008. (Id. at 2.) The  
7 appeal decision reiterated that Perry had been examined on February  
8 22, 2008, and a treatment plan was formulated at that time. (Id.)  
9 Plaintiff was again informed that he was categorized as a priority  
10 level three and would receive treatment within a year. (Id.) He  
11 was also informed, "If you have a dental emergency, contact your  
12 supervisor or building officer, or complete a health care service  
13 request form (CDC 7362)." (Id.)

14 Perry was dissatisfied with this response and appealed to the  
15 second level of review on June 2, 2008, stating, "[Donovan] medical  
16 [and] dental staff['s] continued [refusal] to provide me dental  
17 treatment for my serious condition does constitute deliberate  
18 indifference [and] I will file a Federal Civil Right[s] Action  
19 under U.S.C. § 1983. You state above [that my] 602 is granted.  
20 This is frivolous." (Id.)

21 His second level appeal was again partially granted and  
22 returned to Perry on July 3, 2008. (Id.) In a separate letter  
23 containing the appeal response, Plaintiff's initial request and  
24 subsequent treatment on February 22, 2008, were referenced, and it  
25 was noted that Perry was also "seen and treated on May 21, 2008 and  
26 tooth #30 was filled and [he] was instructed to submit a Health  
27 Care Service Request Form (CDC 7362) for a comprehensive  
28 examination and treatment plan." (Id. Ex. B at 1.) The appeal

1 response also explained that Perry was "pending an appointment"  
 2 with the dental facility. (Id.) But on June 24, 2008, he was  
 3 transferred to Folsom. (Id.)

4 On August 20, 2008, the Office of Third Level Appeals --  
 5 Health Care sent a letter to Perry explaining it had "received an  
 6 appeal from [him] and [had] determined that it [did] not comply  
 7 with appeal procedures . . . and [was] being screened-out and  
 8 returned . . . ." <sup>4</sup> (Id. Ex. C. at 1.) Perry's Director's level  
 9 appeal was screened out because he "submitted an appeal for Third  
 10 Level Review that contain[ed] a new request." (Id.) The letter  
 11 stated, "Your new medical issues, request for \$5,000,000.00 for  
 12 pain and suffering, must be submitted on a new CDCR for 602-HC to  
 13 the Health Appeals Coordinator at your institution for processing."  
 14 (Id.) The letter also explained that "[t]o submit your appeal for  
 15 Third Level review, please line out your request for the  
 16 \$5,000,000.00 for pain and suffering, initial, and return all  
 17 documentation, including this letter to the Office of Third Level  
 18 Appeals." (Id.)

19 On September 10, 2008, the Office of Third Level Appeals --  
 20 Health Care sent a second letter to Perry explaining it had  
 21 "received an appeal from [Perry] and [had] determined that it [did]  
 22 not comply with the appeal procedures . . . and [was] being  
 23 screened-out and returned to [him] . . . ." (Id. Ex. D at 1.)  
 24 Plaintiff was informed that his appeal was incomplete. (Id.) The  
 25

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26 <sup>4</sup> Chief of Inmate Appeals Branch, D. Foston explains that he  
 27 had no record of accepting or rejecting any third level appeal from  
 28 Perry from April 2, 2008, through the present, but "[t]he Office of  
 Third Level Medical Appeals -- Health Care, started receiving and  
 reviewing medical appeals in August of 2008 . . . ." (Id. Attach.  
 #3 Decl. Foston 2, 4; id. Ex. A.)



1 letter explained, "You have added the new demand for payment of  
2 \$5,000,000.00 for pain and suffering to your originally submitted  
3 appeal. Please line out on this appeal document your request for  
4 \$5,000,000.00; initial and return . . . for continued processing."  
5 (Id. (emphasis omitted).) The letter also stated, "You have  
6 submitted a new CDC Form 602. Please submit this appeal to the  
7 Health Care Appeals Coordinator at your institution for review and  
8 processing. If you are still not satisfied after the Second Level  
9 of Review, you may then submit your appeal to this office for  
10 continued processing." (Id. (emphasis omitted).)

11 Thus, Perry completed the informal, first level of appeal, and  
12 second level of appeal for his grievance regarding dental care, but  
13 his appeals were screened out at the Director's level. CDC  
14 administrative procedures are not properly exhausted until an  
15 inmate has pursued a grievance through all available levels of  
16 review. Brown, 422 F.3d at 935; Butler v. Adams, 397 F.3d 1181,  
17 1183 (9th Cir. 2005); Hazleton, 358 F. Supp. 2d at 929 (citations  
18 omitted). Perry could have resubmitted his original appeal to the  
19 third level without the additional claim for monetary damages or he  
20 could have initiated and pursued through all levels of review a new  
21 grievance including both his dental claim and a claim for damages.  
22 Instead, he chose to file this lawsuit. Because Plaintiff did not  
23 follow prison grievance policies, the dental care and appended  
24 claims are unexhausted.

25 Existing Ninth Circuit case law directs the district court to  
26 dismiss unexhausted claims without prejudice. Vaden, 449 F.3d at  
27 1051 (citing Wyatt, 315 F.3d at 1120). But Vaden and Wyatt were  
28 decided prior to Woodford. Since the Supreme Court's decision in

1 Woodford, it may no longer be appropriate to dismiss Plaintiff's  
2 Complaint with leave to amend if it is too late for Perry to  
3 properly exhaust administrative remedies. An inmate must submit  
4 his grievance "within 15 working days" of the unacceptable lower  
5 level decision. Cal. Code Regs. tit. 15, § 3084.6(c). But the  
6 letters from the Office of Third Level Appeals -- Health Care do  
7 not refer to that deadline. Although it appears that Plaintiff has  
8 exceeded the amount of time available to him, the August 20 and  
9 September 10, 2008 letters instructing him on how to cure the  
10 deficiencies in his Director's Level appeals do not expressly limit  
11 the time in which he may do so. It is uncertain whether a future  
12 attempt by Perry to cure the noted deficiencies will be rejected as  
13 untimely. (See Mot. Dismiss Attach. #3 Decl. Foston 3-4 n.1.)  
14 Therefore, Plaintiff's dental care claims should be **DISMISSED**  
15 **WITHOUT PREJUDICE.**

16 **b. All Other Claims**

17 Defendants Wierzbicky, Brown, Duarte, Pederson, and Contreras  
18 also move to dismiss Perry's Complaint because he has not submitted  
19 any grievances against them. (Mot. Dismiss Attach. #1 Mem. P. & A.  
20 8.) They explain that the unexhausted grievance regarding dental  
21 care does name any of them and is "silent as to any alleged  
22 beating, property confiscation, institution wide conspiracies,  
23 attempted murder, and all other allegations advanced in his  
24 complaint." (Id. at 7.)

25 Defendants have provided three declarations asserting that  
26 Perry did not submit any grievances naming or referring to  
27 Defendants Wierzbicky, Brown, Duarte, Pederson, and Contreras, or  
28 alleging the incidents described in the Complaint that occurred on

1 April 2, 17, and June 10, 2008. (Id. Attach. #2 Decl. Walker 3;  
 2 Attach. #3 Decl. Foston 3-4; Attach. #4 Decl. Pederson 3; see also  
 3 Compl. 1, 4-7.)

4 Chief of the Third Level Appeal -- Health Care, Walker,  
 5 searched for any grievances for the period of April 2, 2008,  
 6 through June 10, 2008, alleging that "Defendants[] Garcia, Brown,  
 7 Durta, Wierzbicky, Valdez, Jackson, Pederson, and Contreras, were  
 8 deliberately indifferent to Perry's safety when they conspired  
 9 against him and inflicted upon him several retaliatory beatings."  
 10 (Mot. Dismiss Attach. #2 Decl. Walker 2-3.) Walker noted the two  
 11 grievances regarding dental care but concluded that "Plaintiff  
 12 failed to submit an appeal to this Office regarding injuries  
 13 through use of force against [Perry] and did not submit any appeals  
 14 during the complained about time period." (Id. at 3.)

15 Chief of Inmate Appeals Branch, Foston, also searched for any  
 16 grievances regarding the relevant time period that named any  
 17 Defendant for claims "relating to [Perry's] dental treatment,  
 18 conspiracy, deliberate indifference to his safety, and medical  
 19 negligence . . . ." (Mot. Dismiss Attach. #3 Decl. Foston 3.)  
 20 Foston concluded that "Perry [had] no appeals that were rejected  
 21 between April 2, 2008 and present. . . . [T]he Inmate Appeals  
 22 Branch [had] not accepted any Third Level appeal from Plaintiff  
 23 relating to [the claims stated in the Complaint]. Therefore, any  
 24 claims resulting from said incident are unexhausted."<sup>5</sup> (Id. at  
 25 4.)

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26  
 27 <sup>5</sup> As noted above, during the relevant time period any claims  
 28 regarding medical care would have gone to the Third Level Appeal --  
 Health Care rather than the Inmate Appeals Branch. (Id. at 2.)  
 Even so, Foston searched his records, but the search yielded no  
 results.

1 Appeals Coordinator Pederson also searched for any grievances  
2 during the relevant time period, naming any Defendant in claims  
3 that they "were deliberately indifferent to [Perry's] safety when  
4 they conspired against him and inflicted upon him several  
5 retaliatory beatings." (Mot. Dismiss Attach. #4 Decl. Pederson 3.)  
6 Pederson noted the February 21, 2008 grievance relating to dental  
7 care and concluded that "[a] thorough search of our records . . .  
8 revealed that Plaintiff did not file an appeal against [Defendants]  
9 relating to allegations of deliberate indifference to his safety or  
10 excessive force, or injuries from retaliatory beatings." (Id. at  
11 3.)

12 Perry attempted to exhaust his administrative remedies  
13 regarding inadequate dental care. He did not, however, mention  
14 Defendants by name or reference in his grievance and did not assert  
15 the factual allegations that are described in his Complaint. (Id.  
16 Attach. #2 Decl. Walker Exs. A-D; id. Attach. #4 Decl. Pederson  
17 Exs. A-B.) Plaintiff made no charges of "conspiracy to cover up a  
18 lawsuit, attempted murder, a violent hate crime, cruel and unusual  
19 punishment, [and an] Eighth Amendment rights violation." (Compl.  
20 2-3.) Perry explains the absence of administrative grievances for  
21 these claims with a self-serving statement that he exhausted all of  
22 his administrative remedies and that on June 10, 2008, three  
23 completed appeal forms were stolen from him. (See Opp'n 1, Mar.  
24 10, 2010; Opp'n 1-2, Mar. 26, 2010.)

25 "[E]xhaustion is not per se inadequate simply because an  
26 individual later sued was not named in the grievances." Jones v.  
27 Bock, 549 U.S. 199, 219 (2007). "Prisoners need comply only with  
28 the prison's own grievance procedures to properly exhaust . . . ."

1 Griffin v. Arpaio, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing  
2 Jones, 549 U.S. at 218). A prisoner in California is not required  
3 to name all defendants in his grievance but must "describe the  
4 problem and action requested." Cal. Code Regs. tit. 15, §  
5 3084.2(a) (2006); see also Thorns v. Ryan, No. 07-CV-00218-H (AJB),  
6 2009 WL 230035, at \*6 (S.D. Cal. Jan. 23, 2009) (citing Lewis v.  
7 Mitchell, 416 F. Supp. 2d 935, 941-45 (S.D. Cal. 2005)); Jensen v.  
8 Knowles, No. 2:02-cv-02373 JKS P, 2008 WL 5156694, at \*4 (E.D. Cal.  
9 Dec. 9, 2008) (explaining that a prisoner in California is not  
10 required to "expressly name the defendant[]"). "[W]hen a prison's  
11 grievance procedures are silent or incomplete as to factual  
12 specificity, 'a grievance suffices if it alerts the prison to the  
13 nature of the wrong for which redress is sought.'" Griffin, 557  
14 F.3d at 1120 (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir.  
15 2002)).

16 Even reading Perry's grievance in the light most favorable to  
17 him, the grievance regarding dental care does not describe the  
18 "problem and action requested" for other claims in his Complaint or  
19 state a claim against these Defendants. Cal. Code Regs. tit. 15, §  
20 3084.2(a); Jones, 549 U.S. at 218; Griffin, 557 F.3d at 1119.  
21 Perry has not properly exhausted his administrative remedies for  
22 his claims and assertions of conspiracy, attempted murder, a  
23 violent hate crime, cruel and unusual punishment, and Eighth  
24 Amendment violations alleged in his Complaint, and the Motion to  
25 Dismiss should be **GRANTED**.

26 It may no longer be appropriate to dismiss this Complaint with  
27 leave to amend if it is too late for Perry to properly exhaust  
28 administrative remedies. Woodford, 548 U.S. at 95. A prisoner

1 would "have little incentive to comply with the system's procedural  
2 rules unless noncompliance carries a sanction." Id. Plaintiff is  
3 in that situation. Because a grievance against Defendants was not  
4 filed within fifteen working days of the action being challenged,  
5 any attempt to file it now is untimely. See Cal. Code Regs. tit.  
6 15, § 3084.6(c).

7 Exceptions to the exhaustion requirement are limited. See  
8 Booth, 532 U.S. at 741. In Booth, the Supreme Court explained,  
9 "Thus, we think that Congress has mandated exhaustion clearly  
10 enough, regardless of the relief offered through administrative  
11 procedures." Id. (citing McCarthy, 503 U.S. at 144) (footnote  
12 omitted). "'Where Congress specifically mandates, exhaustion is  
13 required[.]'" Id. (quoting McCarthy, id.) Booth and Woodford  
14 effectively eliminated most exceptions to exhaustion.

15 An inmate must file his grievance "within 15 working days" of  
16 the event being appealed. Cal. Code Regs. tit. 15, § 3084.6(c).  
17 Perry's injury and interactions with Defendants occurred between  
18 April 2 and June 10, 2008, over two years ago; Plaintiff no longer  
19 has time to exhaust his administrative remedies against Defendants.  
20 See id.; (Compl. 1.) There are no applicable exceptions to the  
21 exhaustion requirement. For all these reasons, Plaintiff's  
22 Complaint against Defendants Wierzbicky, Brown, Duarte, Pederson,  
23 and Contreras, none of whom appear to be involved in Plaintiff's  
24 dental care, should be **DISMISSED WITHOUT LEAVE TO AMEND.**

25 **B. Motion to Strike Allegations of Criminal Conduct**

26 Perry's Complaint asserts that Defendants Wierzbicky, Jackson,  
27 Brown, Duarte, and Pederson attempted to murder him and committed a  
28 violent hate crime against him. (Compl. 2-3.) This assertion is

1 detailed in the remainder of his Complaint. (Id. at 4-7.)  
2 Defendants contend that Plaintiff's allegations regarding attempted  
3 murder and a violent hate crime should be stricken because  
4 "individuals cannot initiate criminal charges in civil court  
5 . . . ." (Mot. Dismiss Attach. #1 Mem. P. & A. 8 (citing Fed. R.  
6 Civ. P. 2).) They do not cite the specific page and line  
7 references they seek to strike.

8       It is well established that a private citizen has no authority  
9 to initiate a federal criminal prosecution; that power is vested  
10 exclusively in the executive branch. See Morrison v. Olson, 487  
11 U.S. 654, 705 (1988); United States v. Nixon, 418 U.S. 683, 693  
12 (1974); Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir. 1989) (stating  
13 that only the United States as prosecutor can bring a criminal  
14 complaint under RICO). Additionally, § 1983 allows a prisoner to  
15 file a civil action where he has been deprived "any rights,  
16 privileges, or immunities secured by the Constitution and laws  
17 . . . ." 42 U.S.C.A. § 1983. Attempted murder and a violent hate  
18 crime are criminal charges, not properly part of a civil action.  
19 See Cal. Penal Code § 189 (West Supp. 2010); id. §§ 422.75, 664  
20 (West 2008).

21       But Defendants read Perry's Complaint too narrowly. "To  
22 prevail on this motion to strike, the movant must clearly show that  
23 the challenged matter 'has no bearing on the subject matter of the  
24 litigation and that its inclusion will prejudice the defendants.'" 2  
25 James Wm. Moore et al., Moore's Federal Practice § 12.37[3], at  
26 12-129 (3d ed. 2010) (footnote omitted). The summary references to  
27 "attempted murder" and "a violent hate crime" correspond to factual  
28 allegations in the Complaint. (See Compl. 4-7.) A plaintiff's

reference to a "hate crime" in a civil rights complaint is not uncommon. (See, e.g., Hubbard v. Folsom State Prison, No. Civ. S-07-2562 MCE DAD PS (E.D. Cal. Mar. 7, 2008) (noting that "reference to hate crimes suggests that [Plaintiff] may be attempting to allege civil rights violations . . . .") In another context, the court denied a motion to strike a discussion of an organized crime figure and alleged illegal activity of some defendants. See First City Nat'l Bank & Trust Co. v. FDIC, 730 F. Supp. 501, 514 (E.D.N.Y. 1990). Thus, Defendants' request to strike the allegations in Plaintiff's Complaint that refer to attempted murder and a violent hate crime is **DENIED**. See Brace v. IBM, 953 F. Supp. 561, 563 n.1 (D. Vt. 1997) (noting that motion to strike is nondispositive and within the pretrial authority of magistrate judges).

### **C. Immunity**

#### **1. Eleventh Amendment Immunity**

Defendants Wierzbicky, Brown, Duarte, Pederson, and Contreras argue that they "are immune to suit for damages in their official capacity." (Mot. Dismiss Attach. #1 Mem. P. & A. 8-9.) The Eleventh Amendment grants the states immunity from private civil suits. U.S. Const. amend. XI; Henry v. County of Shasta, 132 F.3d 512, 517 (9th Cir. 1997), as amended, 137 F.3d 1372 (9th Cir. 1998). "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989) (citing Brandon v. Holt, 469 U.S. 464, 471 (1985)).



1 Plaintiff makes claims against all Defendants in their  
2 individual and official capacities. (Compl. 2-3.) He seeks  
3 injunctive and monetary relief from each. (Id. at 9.) Plaintiff's  
4 claim for monetary damages is properly alleged against Defendants  
5 in their individual capacities. See Kentucky v. Graham, 473 U.S.  
6 159, 166 (1985). But the claims against them in their official  
7 capacities are claims against the State of California, which is  
8 absolutely immune from liability for damages. See Brandon, 469  
9 U.S. at 471.

10 Accordingly, Defendants are entitled to sovereign immunity,  
11 and their Motion to Dismiss monetary claims against them in their  
12 official capacities should be **GRANTED WITHOUT LEAVE TO AMEND**. If  
13 Perry is permitted to proceed with his Complaint, he may only seek  
14 monetary damages from Defendants in their individual capacities.

15 **D. California Tort Claims Act**

16 Defendants assert that Perry's allegation regarding stolen  
17 property is barred because it is a supplemental state law claim,  
18 and Plaintiff failed to properly file a tort claim with the Victim  
19 Compensation and Government Claims Board. (Mot. Dismiss Attach. #1  
20 Mem. P. & A. 9.) Defendants have provided a copy of a January 23,  
21 2009 letter addressed to Perry from the Victim Compensation and  
22 Government Claims Board which explains that Plaintiff's claim was  
23 not presented to the Board until after the six-month claim filing  
24 period had expired. (Id. Ex. A 1.) Attached to the letter is  
25 Perry's claim form which was received by the Board on January 16,  
26 2009; Plaintiff alleges that he was transferred from Donovan to  
27 Folsom, but he never received his property. (Id. at 6.) Perry's  
28 claim form also included two grievance forms asserting that he was

1 transferred on June 23, 2008, but he never received his property  
2 after transfer. (Id. at 7, 9.)

3 When adjudicating a supplemental state law claim, this Court  
4 must apply state substantive law. United Mine Workers of Am. v.  
5 Gibbs, 383 U.S. 715, 726 (1966). Under the California Tort Claims  
6 Act, filing a tort claim within the time and in the manner  
7 prescribed by statute is a prerequisite to bringing a lawsuit  
8 against any state employee or agency. See Cal. Gov't Code §§  
9 905.2, 911.2 (West Supp. 2010); Cal. Gov't Code §§ 945.4, 950.2  
10 (West 1995). A tort claim must be filed within six months of when  
11 the cause of action accrues. Cal. Gov't Code § 911.2. This  
12 applies to "injur[ies] resulting from an act or omission [of a  
13 public employee] in the scope of his employment as a public  
14 employee . . . ." Cal. Gov't Code § 950.2.

15 In his Complaint, Perry alleges that Defendants stole his  
16 property on June 10, 2008. (Compl. 6-7.) In his claim to the  
17 Victim Compensation and Government Claims Board, Plaintiff asserts  
18 his property was never returned to him after his transfer on June  
19 23, 2008. (Mot. Dismiss Attach. #1 Mem. P. & A. Ex. A 6-7, 9.)  
20 His tort claim was received by the Board on January 16, 2009, over  
21 six months after either June 10 or 23, 2008. (Id. at 1, 6.) Perry  
22 has not provided any evidence that he submitted a tort claim within  
23 the time and in the manner prescribed by statute. Thus, he did not  
24 fulfill a prerequisite to bringing his state claim. Defendants'  
25 Motion to Dismiss Plaintiff's supplemental state law claim should  
26 be **GRANTED WITHOUT LEAVE TO AMEND.**

**E. Injunctive Relief**

Plaintiff seeks an injunction requiring Defendants "to stay 1000 yards away from [him], [and] reimburse [him] \$500,000 for all [his] property that R.J. Donovan officials destroyed." (Compl. 9.)

Defendants Wierzbicky, Brown, Duarte, Pederson, and Contreras assert that Perry's Complaint "does not meet the standard for entitlement to injunctive relief . . . ." (Mot. Dismiss Attach. #1 Mem. P. & A. 11.) They explain that an injunction is not necessary because Perry has been transferred to Folsom State Prison. (*Id.*) "[M]oreover, the remainder of plaintiff's request is a demand for monetary compensation, in addition to the compensatory and punitive damages he demands." (*Id.*) Defendants also contend that Perry "fails to allege any ongoing or prospective violations of his constitutional rights, but instead seeks compensation for past wrongs . . . ." (*Id.*)

Injunctive relief is an equitable remedy that is appropriate where the plaintiff can show he will suffer a "likelihood of substantial and immediate irreparable injury" if an injunction is not granted. *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1049 (9th Cir. 1999) (en banc) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)); see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

The traditional criteria for granting an injunction are "(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to the plaintiffs if injunctive relief is not granted; (3) a balance of hardships favoring the plaintiffs; and (4) advancement of the public interest.'" *Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001) (quoting *Textile Unltd., Inc. v.*

1 A.BMH & Co., 240 F.3d 781, 786 (9th Cir. 2001). Under the  
2 alternative test for granting injunctive relief, the Court examines  
3 whether "serious questions are raised and the balance of hardships  
4 tips sharply in favor of the moving party." Stuhlbarg Intern.  
5 Sales Co. v. John D. Brush & Co., 240 F.3d 832, 840 (9th Cir. 2001)  
6 (citing Dr. Seuss Enters. v. Penguin Books USA, Inc., 109 F.3d  
7 1394, 1397 n.1 (9th Cir. 1997)). Under either measure, this  
8 Plaintiff is not entitled to injunctive relief.

9 As Defendants correctly observe, Perry's remedies are limited  
10 by the Prison Litigation Reform Act. (Mot. Dismiss Attach. #1 Mem.  
11 P. & A. 11-12.) Section 3626(a)(1) of the Act states, "Prospective  
12 relief in any civil action with respect to prison conditions shall  
13 extend no further than necessary to correct the violation of the  
14 Federal right of a particular plaintiff or plaintiffs." 18  
15 U.S.C.A. § 3626(a) (West 2006). This statutory restriction limits  
16 available relief.

17 Plaintiff requests an injunction preventing Defendants from  
18 coming within one thousand yards of him. (Compl. 9.) The Court  
19 does not have jurisdiction to issue wide-reaching injunctions that  
20 extend beyond any actual injury suffered by a plaintiff. Lewis,  
21 518 U.S. at 357. "The remedy must of course be limited to the  
22 inadequacy that produced the injury in fact that the plaintiff has  
23 established." Id. (citing Missouri v. Jenkins, 515 U.S. 70, 88,  
24 89 (1995)).

25 Perry has also failed to demonstrate that he may suffer an  
26 imminent injury. In City of Los Angeles v. Lyons, 461 U.S. at 101-  
27 02, the Court explained that "[t]he plaintiff must show that he  
28 'has sustained or is immediately in danger of sustaining some

1 direct injury' as a result of the challenged official conduct and  
2 the injury or threat of injury must be both 'real and immediate,'  
3 not 'conjectural' or 'hypothetical.'" Plaintiff is no longer  
4 housed at Donovan, the location where the Defendants are employed.  
5 (Compl. 2-5.) Thus, he has failed to demonstrate an imminent  
6 injury.

7 Plaintiff is not entitled to injunctive relief unless he can  
8 show that he will suffer substantial and immediate irreparable  
9 injury for which there is an inadequate remedy at law. Easyriders  
10 Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495 (9th Cir. 1996).  
11 "Under any formulation of the test [for injunctive relief],  
12 plaintiff must demonstrate that there exists a significant threat  
13 of irreparable injury." Oakland Tribune, Inc. v. Chronicle Publ'g  
14 Co., 762 F.2d 1374, 1376 (9th Cir. 1985). Perry has made no  
15 showing of irreparable harm. In addition, because he is no longer  
16 housed at Donovan, Plaintiff lacks standing to seek injunctive  
17 relief directed at these Defendants.

18 Additionally, "[i]t is a basic doctrine of equity  
19 jurisprudence that courts of equity should not act . . . when the  
20 moving party has an adequate remedy at law and will not suffer  
21 irreparable injury if denied equitable relief." Morales v. Trans  
22 World Airlines, Inc., 504 U.S. 374, 381 (1992) (quotations omitted)  
23 (citing O'Shea v. Littleton, 414 U.S. 488, 499 (1974); Younger v.  
24 Harris, 401 U.S. 37, 43-44 (1971)). Perry seeks compensation as  
25 part of his request for an injunction; he has a remedy at law to  
26 recover monetary damages. Thus, equitable relief is not  
27 appropriate.

28



1 objections with the Court and serve a copy on all parties on or  
2 before August 16, 2010. The document should be captioned  
3 "Objections to Report and Recommendation." Any reply to the  
4 objections shall be served and filed on or before August 30, 2010.  
5 The parties are advised that failure to file objections within the  
6 specified time may waive the right to appeal the district court's  
7 order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

8 **IT IS SO ORDERED.**

9  
10 DATE: July 16, 2010

  
RUBEN B. BROOKS  
United States Magistrate Judge

11  
12 cc: Judge Burns  
13 All Parties of Record  
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